RECENT AMERICAN DECISIONS.

Court of Appeals of New York.

HERRINGTON v VILLAGE OF LANSINGBURGH.

A municipal corporation is not liable to the owner of a team for an injury suffered whilst endeavoring to control his horses, who had been frightened by a blast fired in a neighboring street by a contractor engaged in constructing a sewer, under a contract providing for the entire control of the work, and also the payment, by the contractor, of all damage arising from the necessary blasting.

APPEAL from General Term, Supreme Court, Third Department. (Opinion in 36 Hun, 598.)

Edgar L. Fursman, for appellant.
Henry A. Merritt, for respondent.

EARL, J. June 19, 1888. The defendant is a municipal corporation, and by its charter is clothed with power to cause the construction of sewers. On the 23d day of October, 1878, it made and entered into a contract in writing with Broderick & Ellis for the construction of a sewer in and through one of its streets called "State Street." The specifications for the work provided that all damage arising from blasting to be done in the construction of the sewer should be paid for by the contractors. State Street crossed Market Street at right angles. On the 7th of December, 1878, the plaintiff came into the village with a team, and tied his horses to a post in Market Street, about fifteen feet from State Street, in front of a grocery, and went into the grocery, and while there the contractors fired a blast in State Street, which frightened the team. The plaintiff rushed from the grocery, and, while attempting to control the team, was severely injured. The place where the blast was fired was about two hundred feet from Market Street, and the team where it was fastened in Market Street was not visible from the place of the blasting. The claim of the plaintiff is that the defendant is responsible to him for the injury he sustained in consequence of the frightening of the horses by the blast. At the place where the horses were fastened the street was in

perfect condition, and the horses did not become restless or frightened from anything existing in the street, and the accident was in no way caused by any imperfect condition of the street, but simply by noise resulting from the blast. If there was any culpable carelessness which caused the injury to the plaintiff, it was that of the contractors. They had entire control of the work, and the manner of its performance. They could choose their own time for firing the blasts, and select their own agents and instrumentality. They could make the charges of powder large or small, and they could in some degree smother the blasts, so as to prevent falling rocks, and much of the noise of the explosion, or they could carelessly omit all precautions, and for the consequences of their negligence they alone would be responsible. If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given the notice; but the duty to give it did not devolve upon the village. And for these conclusions the cases of *Pack* v. *Mayor*, *etc.*, 8 N. Y. 222; *Kelly* v. *Mayor*, *etc.*, 11 Id. 432, and *McCafferty* v. *Railroad Co.*, 61 Id. 178, are ample authority. It is conceded by the learned counsel for the appellant that if the plaintiff had been hit by a fragment of rock thrown by the blast the defendant would not have been, and the contractors alone would have been, responsible. So, too, if a fragment of rock had struck one of the horses, or had fallen or passed near them, and thus had frightened them, causing the injury to the plaintiff, within the authorities cited, the defendant would not have been responsible, and for precisely the same reason no responsibility rests upon it because the team was frightened by the noise of the explosion. A rule which would cast responsibility upon the defendant for injuries resulting from the noise of the explosion, and exempt it from responsibility for injuries caused by fragments of rock thrown by the explosion, would rest upon no rational basis; and require distinctions too fine for the practical administration of justice. The judgment should be affirmed, with costs.

All concur, except RUGER, C. J., not voting, and DANFORTH, J., dissenting.

1. When counsel for the appellant conceded "that, if the plaintiff had been hit by a fragment of rock thrown by the blast, the defendant would not have been, and the contractor alone would have been, responsible," the Court condemned the distinction between a liability arising from the noise made and one caused by a flying fragment of a rock.

In Indiana a statute provided that a city "shall have exclusive power over the streets, highways, alleys," etc., "within such city." Another statute authorized such city "to conduct and establish works for furnishing the city with wholesome water, and for the purpose of drainage of such city, may go beyond the city limits, and condemn lands and materials, and exercise full jurisdiction and all the necessary power therefor; or the common council may authorize any incorporated company or association to construct such works, and in such case the city may become part stockholder in any such company or association;" * * * "the common council shall have power to enforce ordinances" for such purpose. So, by statute, the city had power to enforce ordinances "to prevent the incumbering of streets, squares, sidewalks, and crossings with vehicles, or any other substance or materials whatever, interfering with the free use of the same." In still another statute it is provided that a company may be formed "for the construction of waterworks in and for incorporated cities," and that "it shall be the duty of the common council of the city in or for which such company may propose to erect waterworks, by resolution duly passed and entered upon its minutes, to grant to such company such right to the use of the streets, alleys, wharves, and public grounds of such city as shall be necessary to enable such company to construct the proper works for the supply of water for the use of such city and its inhabitants: *Provided*, That the common council of such city may, in such grant, impose such just and reasonable terms, restrictions and limitations upon such company, in reference to the manner in which such streets, alleys, wharves, and public grounds are to be used * * * as shall be necessary to guard against the improper use of such streets, alleys, wharves, and public grounds."

While the provisions of these statutes were in force, the city of Logansport undertook, itself, the construction of waterworks within its boundaries, and let out the contract therefor. The works were not constructed by nor owned by an incorporated company but by the city; and the assignor of the contract for their construction contracted directly with the city. One Dick was killed by a flying fragment of a rock, thrown carelessly by means of a blast, in or near the street, under charge of the assignee of the contractor, and the city was held liable: *The City of Logansport* v. *Dick*, 70 Ind. 65.

The statutes quoted imposed nothing more than the common-law duty, to keep the streets in safe condition; and inflicted no more liability for neglect in this respect than the common-law liability, where that liability is recognized. The Court stated the facts as follows: "The special findings of the jury showed, among other things, that, after its adoption of a system of waterworks for municipal purposes, the appellant (the city) entered into a written contract with one D. A. Chappel for the erection and completion of said works for a specific sum of money; that this contract was assigned by said Chappel to the defendant Smith, and by said Smith to

the defendant Farrington, prior to the execution of the work and to the death of John Dick; that the appellant had nothing to do with the employment, discharge, or payment of the men, who were engaged in digging and excavating the trenches for laying the water-pipes, or in the blasting of rock, or in the manner of doing the work, prior to the death of said Dick; and that the said Farrington had full and complete control, by himself and his employés, over the mode of digging and excavating the trenches and blasting for the pipes, and he employed, discharged, and paid the men so engaged prior to and at the time of the death of said Dick.

"It is claimed by the appellant's counsel, as we understand their position and argument, that the facts thus specially found by the jury are inconsistent with their general verdict, within the meaning of the statutory provision above quoted (viz., 'when the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly'), in regard to such inconsistency, because they show that the death of John Dick was caused by the wrongful act or omission of Thomas B. Farrington, or of the servants of said Farrington, who at the time was exercising an independent employment, under, and as the assignee of, a written contract with the appellant, and between whom and the appellant the relation of servant and master did not at the time exist. Ordinarily, in such a case, the law seems to be well settled that one person is not liable for the acts or negligence of another person, unless the relation of master and servant exists between them; and that, where an injury has been done by a party exercising an independent employment, the person employing him will not be liable in damages for injury or death resulting from the wrongful act or omissions of such party, or of the servants of such party. The general rule of law, almost universally recognized in this country by the courts of last resort, seems to be that where the work contracted for was not a nuisance *per se*, the employer of the contractor for such work will not be liable to a third person, or his representative, for an injury or death which results from the wrongful act or omission of such contractor, or of his servants, agents, or sub-contractors in the performance of such work: *Hilliard* v. *Richardson*, 3 Gray, 349; *Linton* v. *Smith*, 8 Id. 147; *Brackett* v. *Lubke*, 4 Allen, 138; *Barry* v. *City of St. Louis*, 17 Mo. 121; *Blake* v. *Ferris*, 5 N. Y. 48; *Pack* v. *The Mayor, etc.*, 8 Id. 222; *Kelly* v. *The Mayor, etc.*, 11 Id. 432; *Storrs* v. *The City of Utica*, 17 Id. 104; *McCafferty* v. *The Spuyten, etc., Railroad Co.*, 61 Id. 178; *Painter* v. *The Mayor, etc.*, 46 Pa. St. 213; *Allen* v. *Willard*, 57 Id. 374; *Wray* v. *Evans*, 80 Id. 102; *DeForrest* v. *Wright*, 2 Mich. 368; *The City of Detroit* v. *Corey*, 9 Id. 165; *Harper* v. *City of Milwaukee*, 30 Wis. 365; *Scammon* v. *City of Chicago*, 25 Ill. 424; *City of Springfield* v. *L. Claire*, 49 Id. 476; *Pfan* v. *Williamson*, 63 Id. 16; *City of Cincinnati* v. *Stone*, 5 Ohio St. 38; *Clark* v. *Fry*, 8 Id. 358; *Chicago City* v. *Robbins*, 2 Black. 418; *Water Company* v. *Ware*, 16 Wall. 566; Shearm. & Redf. on Neg. § 79; Wharton on Neg. § 818. This general rule of law was fully recognized, approved, and acted upon by this Court in the decision of the recent case of *Ryan* v. *Curran*, 64 Ind. 345.

"It seems to us that, in view of the exclusive power conferred, and of the correlative duty necessarily imposed

upon the appellant over the streets, alleys, and highways within its corporate limits, in and by the legislation of this State, providing for the incorporation of cities, the appellant could not and ought not to be allowed to avoid the imperative duty, which it owed to the public, to keep its streets, alleys, and highways in a safe condition for the use in the usual manner by travellers, nor to escape responsibility for its neglect or failure to perform such duty, upon the plea that it had entered into a contract with another person for the performance of the work, which rendered such use of the street, alley, or highway unsafe or dangerous to the travelling public. It cannot be said, we think, that the appellant's contract with Farrington or his assignors, for the construction and completion of its waterworks, as found by the jury, could or did relieve the appellant of its legal duty to keep those streets, wherein the water-pipes were being laid, in such safe condition for the use in the usual manner as that its inhabitants and the general public might safely and conveniently pass and repass over, along, and across such streets. Notwithstanding such contract the appellant stood charged by law with a duty, and could not relieve itself by that or any other contract of such duty, in the care and control of its streets, in and through which its waterworks were in process of construction. If, in the progress of the work, blasting was dangerous and unnecessary, the appellant's duty to its inhabitants and the public required that it should prevent such blasting; and if, on the other hand, the blasting was necessary, and, though dangerous, the danger could be averted by the use of proper precautions, the appellant's plain duty was to require its contractor to use such precautions. The appellant could not, by any contract it might make, avoid its liability to third persons for injury or death resulting from a breach of its duty in the care and control of its streets: *Grove* v. *The City of Fort Wayne*, 45 Ind. 429; *The Town of Centerville* v. *Woods*, 57 Id. 192; *Mahanoy Township* v. *Scholby*, 84 Pa. St. 136." See, also, *The City of Logansport* v. *Dick*, 70 Ind. 65; followed in *Turner* v. *City of Indianapolis*, 96 Ind. 51; *The City of Fort Wayne* v. *Coombs et al.*, 107 Id. 75.

In *Pack* v. *City of New York*, 8 N. Y. 222, cited in the principal case, a contractor, grading a street within the city of New York, carelessly discharged a blast in the street, and thereby injured a house by a stone falling upon it. The city was held not liable on the ground that the relation of master and servant did not exist between the city and the contractor.

In *Kelly* v. *City of New York*, 11 N. Y. 432, the injury was to a horse, caused by a blast in the street, and the city was held not liable, relying upon *Pack* v. *New York*, *supra*. (On the second trial the plaintiff was nonsuited: 4 E. D. Smith, 291.) In these two cases, the case of *Blake* v. *Ferris*, 5 N. Y. 48, was relied upon, and also the case of *Rapson* v. *Cubitt*, 9 Mees. & Wels. 710. The case of *Blake* v. *Ferris* was where the plaintiff fell into a sewer, being constructed in the street. The action was against the licensee of the city, but the sewer was left in the condition in which it was the cause of the accident by a contractor of the licensee, and who had absolute control of the work. The licensee was held not liable; and this was possibly a correct decision. It appeared that the city retained some control over the work, for it was

constructed under the inspection of its street commissioner, and the licensee was under an obligation to the city to protect the public by proper guards and lights at night, and to "be answerable for any damages or injuries which might be occasioned to persons, animals, or property in any manner connected with the construction of the sewer." This decision was afterwards doubted by COMSTOCK, J., in *Storrs* v. *Utica*, 17 N. Y. 106, not because the opinion did not contain a correct exposition of the doctrine of *respondeat superior*, but whether it was applied with strict accuracy to the facts of the case. "For," says he, "the cause of the accident was not any unskilfulness in the performance of the work, *but the result of the work itself*, however skilfully performed." In *Rapson* v. *Cubitt*, relied upon in *Pack* v. *City of New York*, Cubitt contracted with the Clarence Club to make certain alterations in their club house, and, amongst the rest, to prepare and fit the necessary gas fittings; he made a contract with a gas fitter to execute that part of the work, who performed it. In the course of the work, through the gas fitter's negligence, the gas exploded and injured the plaintiff, who sued Cubitt to recover for the injury, on the ground that the gas fitter was his servant; but his right of action was denied, on the ground that there was no relation of master and servant.

In the principal case, *McCafferty* v. *The Spuyten, etc., R. R. Co.*, 61 N. Y. 178, is cited and relied upon. In that case, a railroad company hired a contractor, who had the entire charge of the work, employing and discharging all the men at work in construction of its entire road-bed, taking from him a contract of indemnity of all liability arising by reason of his or his servants' negligence. The plaintiff was injured in his property by stones thrown on his land by a blast. The railroad company was held not liable, although there was a strong dissenting opinion by Commissioner Wright.

It will thus be seen that none of the cases relied upon in the principal case are strictly in point, for they do not touch upon the duty of a municipal corporation to keep its streets in order, and its impossibility to shift that burden, by contract, on to another, and thus escape liability.

In Pack's case and in Kelly's case above referred to, the injury was collateral; and not a necessary incident of the work done. In *Storrs* v. *City of Utica*, 17 N. Y. 104, this distinction is pushed forward very vigorously, and the assertion made that these cases were rightly decided. In the latter case, the city let out the construction of a sewer to a contractor, who omitted to use the proper guards; and the plaintiff by reason of this neglect fell into the sewer and was injured. The city was held liable on the ground that the injury resulted from the very act the contract required him to do, and in such an instance the maxim of *respondeat superior* applies: Cooley on Torts (1st ed.), 546. But in the opinion, there is laid down a doctrine not strictly calling for its enunciation, that a city cannot avoid liability, in such a case, by letting out the construction of a sewer to an independent contractor. "What then is the obligation of a city corporation when it undertakes to construct a sewer in a public street? Can it in that undertaking, and in any mode of providing for the execution of the work, throw off the duty in question and the responsibilities through which that duty is to be enforced? Although the work may be let out by contract, the corporation still remains charged with the care

and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take those precautions. The contractor may very probably be bound by his agreement, not only to construct the sewer but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot, I think, in this way either avoid indictment in behalf of the public or its liability to individuals who are injured."

In McCafferty's case, it is said that "the defendant was held liable because it owed a duty to the public to keep its streets in a safe condition for travel, and not because it was responsible for any negligent act of the contractor;" and a quotation is made from *Water Company* v. *Ware*, 16 Wall. 566, which was a case where the defendant had taken a contract to lay water-pipes in the streets of St. Paul, and then sublet the work, and the sub-contractor, by carelessness in running a steam engine in the street, scared a horse, which ran away and injured the plaintiff. The defendant was held liable, on the ground of a contract of indemnity existing between the contractor and the sub-contractor. See *Creed* v. *Hartman*, 29 N. Y. 591, for a discussion of *Storrs* v. *Utica*, *supra*. Storrs's case is referred to as an authority in *Brusso* v. *City of Buffalo*, 90 N. Y. 679. There, the plaintiff fell into an excavation made in a street and was injured. "The excavation was made under the direction of the water department of the city by a contractor with that department. The plaintiff in attempting to cross the street in the night time, fell into the excavation and received the injury. * * * * The city was under an absolute duty to keep its streets in a safe condition for public travel, and was bound to exercise reasonable diligence and care to accomplish that end, and when it caused this excavation to be made in the street, it was bound to see that it was carefully guarded, so as to be reasonably free from danger to travellers upon the street. It is not absolved from its duty and its responsibility because it employed a contractor to make the excavation. That is settled by a long line of decisions in this and other States: *Storrs* v. *City of Utica*, 17 N. Y. 104; *Chicago City* v. *Robbins*, 2 Black. 418; *Robbins* v. *Chicago City*, 4 Wall. 657; *Water Company* v. *Ware*, 16 Id. 566; *City of St. Paul* v. *Seitz*, 3 Minn. 297; *City of Logansport* v. *Dick*, 70 Ind. 65; Dillon on Municipal Corporations, §§ 791, 792, 793."

Storrs's case was again cited and commented upon in *Vogel* v. *Mayor, etc.*, 92 N. Y. 10. In this last case a contractor, after digging holes in a street, in pursuance of his contract, abandoned the work. Water accumulated in these holes after the time for the performance of the work had expired, and then injured an adjoining lot owner. The city was held liable, because it permitted the defect to remain after the work had been abandoned. Blake's case, Pack's case, and Kelly's case were held not to be in point.

In *City of Springfield* v. *L. Claire*, 49 Ill. 476, it is said: "The construction of the sewer by contract did not release the city from the obligation while in process of construction, to

have it so carried on as not to endanger the lives or limbs of travellers upon the street. It could have required this of the contractors, and it was negligence to omit it. * * * * There is no charge in this declaration of negligence in not keeping the street in repair, but for permitting the work to be carried on in a street, dangerous in itself, without proper safeguards, and which they neglected to supply." See *Blake* v. *St. Louis*, 40 Mo. 569.

Still adhering to the early case in the Court of Appeals of New York, it was held by the Supreme Court of that State, under the same conditions as in *Blumb* v. *City of Kansas*, 84 Mo. 112, in the earlier stage of the case under annotation that the city was not liable: *Herrington* v. *Village of Lansingburgh*, 36 Hun, 598. So, following *Storrs* v. *City of Utica*, a similar decision was made in *Dressell* v. *City of Kingston*, 32 Hun, 533. Exactly in a line with the doctrine of *Logansport* v. *Dick*, *supra*, is *Nashville* v. *Brown*, 9 Heisk. 1; *Mayor, etc.*, v. *O'Donnell*, 53 Md. 110 (approving Storrs's case and disapproving Barry's and Painter's cases); *City of Joliet* v. *Seward*, 86 Ill. 402; *Wilson* v. *City of Wheeling*, 19 W. Va. 323; *Watson* v. *Tripp*, 11 R. I. 98; see *Savannah* v. *Waldner*, 49 Ga. 316; *Detroit* v. *Corey*, 9 Mich. 165; *Palmer* v. *City of Lincoln*, 5 Neb. 136 (the last two cases follow the doctrine of Storrs's case). See *City of Cincinnati* v. *Stone*, 5 Ohio St. 38; *Lockwood* v. *New York*, 2 Hilt. 66; *Circleville* v. *Neuding*, 41 Ohio St. 465. Where a railroad company was constructing its line in a street, the town was held liable for an injury caused by obstructions the company had placed there: *Willard* v. *Town of Newbury*, 22 Vt. 458; *Batty* v. *Duxbury*, 24 Id. 155: so, one constructing a sewer into which the plaintiff fell: *City of Buffalo* v. *Halloway*, 3 Selden, 493. We have not overlooked the case of *Painter* v. *City of Pittsburgh*, 46 Pa. St. 213; s. c. 3 AMERICAN LAW REGISTER, N. S. 350; and several others following in its train or preceding it. That was a case where one Painter fell into a sewer, being constructed by a contractor with the city, and was killed. The action was brought by his wife; and the city held not liable. The decision is made to turn solely upon the relation of master and servant, or of the non-control of the city over the immediate work. "The verdict determines that the fault was all that of the contractors. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants—neither servants nor agents. They were in an independent employment, and sound policy demands that, in such a case, the contractor alone should be held liable." Nothing is said of the duty of the city to the public. This neglect was noticed by Judge MITCHELL in a note appended to the case in THE REGISTER, p. 360. The views of the Judge expressed in that note, dissenting from the opinion, have met the approval of a number of appellate Courts, and the case as a sound authority rejected.

In *City of Erie* v. *Caulkins*, 85 Pa. St. 247, it was held that a city was not liable to a person falling into an excavation, carelessly left open, for a sewer, being constructed by a contractor with the city, even though the latter reserved the power to direct by its engineer changes in the time and manner of conducting the work, and the contractor was held responsible to indemnify the city for any damages it should be subjected to in consequence of his neglect, he executing a bond to the city for that purpose. See *Reed* v. *Allegheny*, 80

Penna. St. 300. Here again the principle of master and servant is invoked. Where, however, a township let out the contract of repairing its roads to a contractor, it was held liable to one receiving an injury by reason of the non-repair of a road therein, distinguishing the case from Painter's case, for the reason that "the accident did not happen during the progress of the work and whilst the contractor had the road in his exclusive control, but after it was turned over to the township as a finished job and in proper repair." *Mahanoy Township* v. *Scholby*, 84 Pa. St. 136.

In Missouri, it is held that a city is not liable for an injury to a passer in a street, caused by the negligence of a contractor in blasting: *Blumb* v. *City of Kansas*, 84 Mo. 112. The early New York cases are followed, and *Logansport* v. *Dick*, denied. This is a singular instance of the inability of a *Court* to rise above precedent and decide a case upon principle; for the reason that it does not, upon examination, find the case cited in support of the decision condemned "upon all fours" with the Indiana case, and, therefore, immediately reaches the conclusion that the Indiana case is decided without authority to support it. See the somewhat singular decision of *Barry* v. *St. Louis*, 17 Mo. 121, but reaching the same result. In this same State, where a private corporation, for its own profit and gain, and with the permission of the city, dug a trench in the street, into which the plaintiff fell and injured himself, the city was held liable, because it allowed the streets to be used for a private enterprise: *Russell* v. *Columbia*, 74 Mo. 492. See *Fink* v. *St. Louis*, 71 Id. 52.

In Pennsylvania, under like circumstances, the city was held not liable: *Smith* v. *Simmons*, 103 Pa. St. 32; *Borough of Susquehanna Depot* v. *Simmons*, 112 Id. 384.

Where a statute made it the duty of a supervisor, who was an independent officer, to work the roads of his county, and keep them in repair, his county, it was held, was not liable for his neglect, whereby a traveller was injured: *County Commissioners of Anne Arundel* v. *Duvall*, 54 Md. 350; so of a superintendent: *Barney* v. *City of Lowell*, 98 Mass. 570; a surveyor: *Ball* v. *Town of Winchester*, 32 N. H. 435; *Wolcott* v. *Swampscott*, 1 Allen, 101. Where the city, by statute, was compelled to let the contract to the lowest bidder, it was held, for that reason, not liable: *James* v. *San Francisco*, 6 Cal. 528.

The Supreme Court of the United States have laid down the rule, that where the obstruction or defect caused or created in the street is purely collateral to the work to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party: *Robbins* v. *City of Chicago*, 4 Wall. 657; *City of Chicago* v. *Robbins*, 2 Black. 418; s. c. 2 AMERICAN LAW REGISTER, 529. This rule, and almost the language it is couched in, has been adopted by Judge DILLON, as the better and later rule: 2 Dill. Municip. Corp. § 1030. It is necessarily limited or modified by another rule, that if a man employ another to do a piece of work, intrinsically dangerous, however skilfully performed, he is regarded as the au-

thor of the mischief resulting from it: Id. § 1020. See *Savannah* v. *Waldner*, 49 Ga. 316; *Wright* v. *Holbrook*, 52 N. H. 120.

Is not blasting in a public street intrinsically dangerous? Does not a liability for an injury caused thereby fall within the rule holding one liable who has authorized the performance of work intrinsically dangerous? If a corporation contracts for the construction of sewers in its streets, it authorizes the usage of all means necessary to construct them; and if rock requiring blasting is met with, it impliedly authorizes the use of the blast. As a test of this question, does any one suppose the city, after it had let the contract, could enjoin the use of necessary blasting? Not unless it had provided, in the contract, against its use. If the city, before letting the contract, did not know that blasting would be necessary, it ought to have known it, and cannot plead ignorance where ignorance amounts to negligence.

But without insisting upon this view of the question, it seems that the ground of liability is amply sustained by the proposition anounced in *Logansport* v. *Dick*, that a city owes a duty to the public to keep its streets in a safe condition for public travel, which cannot be contracted away, nor devolved upon another, so as to evade pecuniary liability.

W. W. THORNTON.

Crawfordsville, Ind.

United States Circuit Court, District of New Jersey.

STOCKTON, ATTY.-GEN. OF NEW JERSEY, *v.* BALTIMORE & N. Y. R. R. CO.

There is nothing in the Constitution to prevent Congress from enabling State corporations to carry out the powers of Congress, without interference by the States.

The power of Congress "to regulate commerce," is supreme over the whole subject, and is unembarrassed and unimpeded by State lines or State laws.

The powers of the United States are to be found only in the Constitution of the United States, and are not conferred by the consent of the States, from time to time, however much such consent may facilitate the execution of those powers.

Congress may authorize the erection of a bridge, which is a part of the means of inter-state communication though a State may have forbidden such erection.

The United States may acquire the use of land lying in or belonging to a State without a cession of jurisdiction by the State, and without the consent of the State. In such case, there is concurrent jurisdiction in the National and State Courts.

The shore and land under the water of navigable streams and waters are held by the States, *in trust*, for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce.

Uses of navigation and commerce are paramount to those of public fishery.